IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	No. WD 62362
KENNETH F. SMITH,	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE JOHN BORRON, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Kenneth F. Smith appeals the judgment and order of the Honorable John Borron following a jury trial in Jackson County, Missouri, committing Mr. Smith to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. To the extent this appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Missouri Court of Appeals, Western District, Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.070, RSMO 2000. To the extent that Point II of this brief raises a substantial challenge to the constitutionality of Section 632.492, RSMo Cum. Sup. 2003, jurisdiction lies in the Missouri Supreme Court, Article V, Section 3, Missouri Constitution, and Mr. Smith requests this Court to transfer this cause to the Missouri Supreme Court.

STATEMENT OF FACTS

Kenneth Smith was dating Sharon Black in 1987 (Tr. 429).[1] He was about thirty-four years old (Tr. 429). Mr. Smith and Ms. Black agreed to include another person in their sexual activities, and Ms. Black was to find another female partner to participate (Tr. 431). Ms. Black began bringing Tonya Stone to her house (Tr. 431). Mr. Smith knew that Ms. Stone was underage; he believed her to be fourteen to sixteen years old (Tr. 429). She was, in fact, fourteen years old (Tr. 245). On one occasion Ms. Black and Ms. Stone attempted to "de-pants" Mr. Smith (Tr. 431). He took that as a signal that the three of them would eventually have sex together (Tr. 431). Ms. Smith also believed that he could have sex with Ms. Stone because she had twice before alleged that he had been raped, and Mr. Smith believed that the other men had simply been too rough with her (Tr. 432-433).

Ms. Stone reported that she spent the night at Ms. Black's house, and Ms. Black advised her to go to Mr. Smith's house and ask him for a ride home because Ms. Black had to go to work (Tr. 244). Ms. Stone said that when she knocked on Mr. Smith's door he told her to come in and come back to the

[1] The record on appeal consists of a legal file (L.F.), supplemental legal file (Sup.L.F.), and trial transcript (Tr.).

bedroom where he was (Tr. 244). Mr. Smith was unclothed and got out of bed and began kissing Ms. Stone (Tr. 244-245). He put her on the bed, removed her clothes, and had sexual intercourse with her (Tr. 245). Mr. Smith then took Ms. Stone home, telling her not to tell her mother what had happened (Tr. 245). But she told her mother, who told her to tell Ms. Black (Tr. 245). Ms. Stone did not tell the police what had happened because she was embarrassed (Tr. 245).

Barbara Vance was eight years old in 1988 (Tr. 201, 203, 246). She and her four year old brother went next door to Mr. Smith's home to play with the two-year-old daughter of his girlfriend (Tr. 204-205). Ms. Vance reported that Mr. Smith put the two younger children in a bedroom and told her to sit on his lap (Tr. 204). Mr. Smith put his hand in her pants and put his finger in her vagina (Tr. 205). It hurt and she began crying (Tr. 205). Mr. Smith said that he knew how to make it feel better, and took her to the bathroom and performed oral sex on her (Tr. 205). Mr. Smith told Ms. Vance that this was a lesson her parents had asked him to teach her, and that he named three other girls in the neighborhood that he had also "taught" (Tr. 207-208). He told Ms. Vance that he would go to jail if she told anyone what had happened (Tr. 208). Ms. Vance rode her bicycle to her grandmother's home and told her what had happened (Tr. 208).

That was Ms. Vance's testimony at trial. The State called upon its expert witness to read into evidence the statement Ms. Vance prepared near the time of the incident (Tr. 246-247). Her report of this incident in that statement was roughly the same, except that she said that Mr. Smith told her that his actions were for her own good and if he ever saw her letting a boy touch her like that he would cut the boy's "thing" off (Tr. 247). Ms. Vance wrote in her statement that she remained at Mr. Smith's home until her mother arrived to pick her up (Tr. 247). She reported that she did not tell her mother what had happened because she was afraid of what Mr. Smith might do to her (Tr. 247). Ms. Vance said that she went to Mr. Smith's home the next day because he was baby-sitting her and her brother (Tr. 247). She said that Mr. Smith again put her on his lap and rubbed her privates inside of her clothing (Tr. 248). He stopped when he heard Ms. Vance's mother on the front porch (Tr. 248). It was after this second incident that she reported the contact to her grandmother (Tr. 248).

Mr. Smith pleaded guilty to sexual misconduct with Ms. Vance and was sentenced to five years in prison (Tr. 249, 435). He was offered treatment in the Missouri Sexual Offender Program (MOSOP) but declined the offer because the treatment was not mandatory and he would receive a conditional release date whether he took the treatment or not (Tr. 493-494). Mr. Smith suggested that he

intended to get treatment outside of a prison setting once he was released (Tr. 494).

Mr. Smith was paroled in late 1991 (Tr. 495-496). He did not seek out-patient treatment on his own because he was placed in a half-way house and participated in a twelve-week program and assigned to a therapist (Tr. 494). He then attended an intensive three-month in-patient behavioral training program at Renaissance West (Tr. 443, 444). That was not sex offender treatment, but it taught cognitive thinking, how you see yourself and others see you, and social interactions (Tr. 444). When he successfully completed that program he was placed in a group home for Renaissance West graduates (Tr. 445). But his probation officer instructed Mr. Smith to leave that group home because it was actually located in Kansas (Tr. 445). Mr. Smith also attended AA meetings in prison, the half-way house, and Renaissance West (Tr. 445-446).

Mr. Smith visited Mary Randall and her husband in their apartment across the hall from his in May of 1992 (Tr. 192). Ms. Randall's three and four year old grand-daughters, Jessica and Connie, were there also (Tr. 193-194). Ms. Randall told the girls to go to bed about 10:00 p.m. (Tr. 195). The Randalls lived in a very small apartment, and the girls slept in a walk-in closet without a door (Tr. 196). Ms. Randall told the girls several times to be quiet (Tr. 196). Mr. Smith said that

he would talk to them and quiet them down (Tr. 196). Ms. Randall could see Mr. Smith's legs from about the knees down as he talked to the girls in the closet (Tr. 196-197). She heard Mr. Smith and the girls talking, as if he was telling them a story (Tr. 197). Shortly thereafter Mr. Smith got up and left the Randall's apartment (Tr. 197). As soon as Mr. Smith left, Connie came out of the closet and told her grandparents that Mr. Smith had put his tongue in her mouth and put his hands where they didn't belong (Tr. 198). Jessie told them the same things (Tr. 198).

Mr. Smith's parole was revoked and he was returned to prison to serve the year remaining on his prior sentence (Tr. 442). He was not offered MOSOP during this period of incarceration because he filed a 180 day writ to resolve the charges pending against him for offending against Connie (Tr. 442). Mr. Smith pleaded guilty to touching Connie, and was sentenced to five years but placed on two years probation (Tr. 199, 442, 447). He was released from prison in June of 1993 (Tr. 442).

Mr. Smith's probation was revoked in October of 1994 for smoking marijuana and associating with a known felon (Tr. 354-355). He was again offered MOSOP treatment (Tr. 450). He entered phase I of the program, but refused to go into phase II because that phase was conducted at the Farmington

Correctional Center where he had an "enemy" (Tr. 450). When the law changed in 1996 to deny a conditional release date to anyone not completing the MOSOP program, Mr. Smith again completed phase I and began phase II (Tr. 451). In the group session of phase II he was confronted by the group for not admitting all of his offenses (Tr. 451). When Mr. Smith would not admit offenses he did not commit the group became overwhelming and he dropped out of the program (Tr. 451).

Mr. Smith was notified in November of 1998 of the passage of the Sexually Violent Predator law, and was given another opportunity to complete MOSOP in order to avoid being "targeted" for commitment under the new law (Tr. 368-369, 452). He was scheduled for release from prison on September 9, 1999, so he had enough time to complete the new program which consisted of a three month phase I program and a six to eight month phase II program (Tr. 453). He signed up for MOSOP in November of 1998, and was taken to Farmington Correctional Center in January of 1999 (Tr. 453). He was place in phase I at the end of February, 1999, and completed that phase at the end of May (Tr. 455-456, L.F. 8). When he asked to be placed in phase II of MOSOP he was told that there was not enough time left and he was refused admission into the program (Tr. 456).

Mr. Smith was scheduled for release from prison on September 9, 1999 (Tr. 520). An End of Confinement report prepared on August 25, 1999, concluded that Mr. Smith may meet the criteria of the sexually violent predator law (L.F. 8-11). The State filed a petition on August 31, to civilly commit Mr. Smith as a sexually violent predator (L.F. 1-4). About a week before his scheduled release from prison, Mr. Smith was brought to court for a probable cause hearing, but that hearing was rescheduled to a later date and he was returned to Farmington Correctional Center (Tr. 456-457, 519). On the date of his scheduled release, the Department of Corrections put Mr. Smith out (Tr. 457). He thought that the Department of Mental Health would pick him up for further proceedings under the SVP law, but no one came for him (Tr. 457, 520-521). Mr. Smith returned to his father's home in Blue Springs (Tr. 457). He thought that if DMH wanted him they could find him there (Tr. 522). But when someone did come looking for Mr. Smith he was not there (Tr. 523). Mr. Smith returned to Missouri in late March of 2000 and when he found out that the authorities were looking for him he panicked and fled to Louisiana (Tr. 524-525). There was a "grapevine" between the DMH and the DOC facilities located at the Farmington Correctional Center, and Mr. Smith was afraid that he would be locked up for the rest of his life (Tr. 538). He was found in Louisiana and returned to Missouri (Tr. 525).

Dr. Daniel Birmingham, the director of the psychology department at the Western Missouri Mental Health Center, evaluated Mr. Smith on order of the court (Tr. 213, 225). He opined that Mr. Smith is a sexually violent predator (Tr. 234). Dr. Birmingham diagnosed Mr. Smith with pedophilia based on his three convictions for sexual offenses against children between three and fourteen years old (Tr. 243). It is necessary for that condition to cause Mr. Smith serious difficulty controlling his behavior to establish a mental abnormality under the statute (Tr. 257). Dr. Birmingham said that he found such difficulty in the records regarding Mr. Smith (Tr. 260). Mr. Smith offended against Connie and Jessica after a prior conviction and while on parole and under supervision (Tr. 260). He offended against them in a place where he could be seen and with their grandparents present (Tr. 260). Dr. Birmingham concluded that the offenses against Ms. Stone were also under circumstances where he could have been discovered by others (Tr. 260). His offenses against Connie and Jessica were unplanned, suggesting to Dr. Birmingham impulsivity and difficulty with control (Tr. 261).

Dr. Birmingham found other evidence of Mr. Smith's difficulty controlling his behavior (Tr. 265). Several probation violation reports indicated that Mr. Smith was living with a woman who had a six year old son after having been

told several times by his probation officers not to do so (Tr. 265, 268-270). Dr. Birmingham identified this as a violation of Mr. Smith's probation (Tr. 265). He acknowledged, however, that that there was no probation order in the records prohibiting all contact with children, only the named victims, and that Mr. Smith's probation was not revoked for contact with this boy (Tr. 350-353). Mr. Smith's probation was revoked for smoking marijuana and being in contact with a felon (Tr. 354-355). Dr. Birmingham also noted that Mr. Smith's pedophilia is limited to females, and the boy was not at risk of being sexually molested by Mr. Smith (Tr. 350). The doctor also relied on a probation violation report involving a reported physical assault by a girlfriend who said that her thirteen year old son and thirteen year old daughter would sometimes visit at the apartment where she and Mr. Smith lived (Tr. 268).

Dr. Birmingham also opined that Mr. Smith is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility (Tr. 278). This opinion began with the admission that "a lot of that [assessment] is past behavior." (Tr. 279). Dr. Birmingham then turned to the research that indicates a base rate of re-offense by child molesters of approximately fifty-two percent (Tr. 279-280). He suggested that some authors believe that figure is low in comparison to actual re-offending (Tr. 280). The base rate came from research

conducted by Dr. Prentky (Tr. 282). Dr. Birmingham said the base rate is important to compare how an individual fits within the research sample group, but acknowledged that the base rate does not automatically mean a particular person has that level of risk (Tr. 284). Since Dr. Birmingham concluded that Mr. Smith's risk to re-offend was greater than fifty percent that placed him within the base rate set out in the literature (Tr. 285).

Dr. Birmingham also looked at other factors identified in the literature to associate with increased risk of committing sexually violent crime and indicated that a number of those factors are present in Mr. Smith or his history (Tr. 288). There was a wide range of ages for his victims, from three to fourteen (Tr. 290). Mr. Smith's attraction to children is a deviant sexual preference (Tr. 290). He has had three prior sex offenses plus an incident of non-sexual violence (Tr. 291, 292-293). A girlfriend alleged that Mr. Smith assaulted her and dislocated her jaw about the same time as his other probation violations (Tr. 293, 295). Connie and Jessica were strangers to Mr. Smith, indicating impulsivity rather than building a relationship with his victims (Tr. 296-297). Mr. Smith offended while under supervision (Tr. 297). He offended in places where he could be caught (Tr. 298). Mr. Smith told the victims in 1992 that they would be in trouble if they told, which Dr. Birmingham characterized as the use of force or a threat (Tr. 298-299).

Mr. Smith engaged in a variety of sexual acts with the 1988 victim, sodomy and digital penetration (Tr. 299). Use of controlled substances disinhibits behavior (Tr. 299). A stable work history of over one year decreases risk, and while Mr. Smith was employed for three years before the 1992 offenses, he was out of prison only three months before re-offending so he was employed less than one year (Tr. 300).

Dr. Birmingham also turned to actuarial instruments to assess Mr. Smith's risk of re-offending, the Static-99 and MnSOST-R (Tr. 301-302). Mr. Smith's score of four on the Static-99 is associated with a twenty-nine to forty-three percent risk of re-offending within fifteen years (Tr. 303). Dr. Birmingham stressed that this did not mean that there was a twenty-nine to forty-three percent chance that Mr. Smith would commit a new offense because the instrument measures new convictions and not every offense leads to a conviction (Tr. 303). Mr. Smith's MnSOST-R score of seventeen predicted a seventy-two to one hundred percent risk of re-arrest for a new sex offense within six years (Tr. 304). Dr. Birmingham again noted that re-arrest is lower than re-offending (Tr. 304). From these instruments Dr. Birmingham opined that Mr. Smith is at high risk to re-offend (Tr. 305).

Dr. Birmingham noted that Mr. Smith completed phase I of MOSOP, but three times dropped out of phase II (Tr. 306-308). From everything he read, Dr. Birmingham concluded that Mr. Smith did not think he needed treatment (Tr. 309). MOSOP reports indicated that Mr. Smith was not open and honest about his crimes and minimized his behaviors (Tr. 310-312). But because research indicates that treatment failure is not as high a risk factor as other factors applied by Dr. Birmingham, he did not apply the risk associated with treatment failure to Mr. Smith in reaching his opinion (Tr. 312).

The Diagnostic and Statistical Manual cautions that a diagnosis does not mean that the person cannot control their behavior (Tr. 321). Pedophilia is one of a broad class of sexual deviancy identified as paraphelias (Tr. 321). The DSM indicates that a lot of times persons have more than one paraphelia (Tr. 322). Dr. Birmingham diagnosed no other paraphelias in Mr. Smith (Tr. 322). Pedophiles will often take elaborate steps to facilitate their urges or fantasies, such as securing jobs where they can be in contact with children, volunteering for activities for the same purpose, or developing relationships with women to gain access to their children (Tr. 322-323). Mr. Smith has never engaged in any such behavior (Tr. 323). There was no evidence of any sexual offending against a child - no allegation, no arrest, no conviction - during the fifteen months Mr. Smith

was on probation in 1993 and 1994, or during the seven months he was in the community after his release from prison in 1999 (Tr. 349, 381, 385).

Dr. Birmingham admitted that the risk factors he applied to Mr. Smith; the ages of the victims, the deviant sexual preference, prior sex offenses, the non-sexual offense, relationship to the victims, probation supervision, location of the offenses, use of force or threats, and variety of acts, are static factors which will never change (Tr. 356-358). If those where the only factors considered, Mr. Smith would always be at high risk to re-offend (Tr. 358). But Dr. Birmingham said those were not the only factors he considered (Tr. 358).

In scientific research, the validity of a study means that it is truly measuring what the study claims it is measuring (Tr. 364-365). Cross-validation is measuring one sample against another (Tr. 365). A study titled Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders was published after Dr. Birmingham scored Mr. Smith on the MnSOST-R (Tr. 366-367). That study discredited the MnSOST-R because it "failed to meet levels of statistical accuracy." (Tr. 366). Dr. Birmingham noted, however, that a couple of other studies indicate that the instrument is valid, and Dr. Doren wrote a 2002 article claiming that the MnSOST-R is a valid instrument (Tr. 393-394, 399).

Another study by Dr. Hansen and Dr. Bussiere, as respected as Dr. Prentky's study, arrived at a base rate of re-offense by child molesters of twelve percent over fifteen years (Tr. 335). Dr. Birmingham agreed that this was a "big difference" from Dr. Prentky's fifty-two percent recidivism rate for child molesters (Tr. 335). But he suggested that the difference could be explained by the different child molesters being studied (Tr. 335). His explanation for this difference was that incest child molesters have a lower offense rate than stranger child molesters (Tr. 335). Dr. Birmingham agreed that if the only matters considered were the diagnosis of pedophilia and Prentky's base rate study a person would always be found a sexually violent predator (Tr. 336). Dr. Birmingham said that he considers more than those factors (Tr. 336).

The only changeable, or dynamic, factor Dr. Birmingham discussed was completion of sex offender treatment (Tr. 360). Successful completion of treatment, resulting in a plan to control behavior and overcome the factors increasing risk, can lower a person's perceived risk to re-offend (Tr. 359). The Hansen and Bussiere study revealed that whether or not a person completes sexual offender treatment is not predictive of re-offending (Tr. 367). The only predictive value relates to being terminated from treatment (Tr. 367). Mr. Smith was never terminated from treatment (Tr. 367). Dr. Birmingham agreed that the

sexually violent predator law was not in effect the first two times Mr. Smith was in prison and refused to participate in MOSOP (Tr. 368). Mr. Smith was informed of the passage of the SVP law, and informed that failure to complete the program would result in him being "targeted" for commitment under that law (Tr. 368-369). It was expected that a person could complete that program within a year, and Mr. Smith had a little over a year left to serve on his sentence (Tr. 369-370). Mr. Smith completed the three-month long phase I, but was not allowed into phase II of the program because he did not have enough time remaining on his sentence when space in the group became available (Tr. 371). Dr. Birmingham refused to speculate whether Mr. Smith could have completed phase II if he had been admitted, instead relying on Mr. Smith's dropping out of treatment on prior occasions to question his commitment to complete the program (Tr. 374-375).

Dr. Birmingham agreed that if Mr. Smith had told others while he was in the community for seven months after his release from prison that he should avoid being around children that would indicate Mr. Smith's awareness that he has a problem (Tr. 381-382). He agreed that is something a pedophile should be aware of (Tr. 382). Dr. Birmingham said that a pedophile should also be aware of his offense cycle, the thoughts and behaviors that led to the offending, and

should have a relapse prevention plan with steps to avoid re-offending (Tr. 383). He suggested, however, that a relapse prevention plan a person puts in place by himself and in a vacuum "is almost laughable" (Tr. 397-398). Dr. Birmingham maintained that offender treatment programs include professionals who can see things an individual will not (Tr. 397). He said that without sex offender treatment with a professional it is possible that there are risk factors Mr. Smith never dreamed of (Tr. 397). Dr. Birmingham believes that the assistance of an expert in risk factors is a necessary element of sex offender treatment (Tr. 397).

Mr. Smith admitted to the jurors that he had sexual intercourse with Ms. Stone, and explained the circumstances surrounding that incident (Tr. 424, 429-434). He admitted sexually abusing Ms. Vance (Tr. 434-435). Mr. Smith told the jurors that he only intended to quiet Connie and Jessica, but found himself imagining what they looked like without clothes and he kissed them and touched Connie's privates with the palm of his hand (Tr. 440-441, 490). He thought he had control of himself before that incident, but it showed him that he did not have control over his behavior and that he needed help (Tr. 441-442).

In 1996, Mr. Smith completed phase I of MOSOP and enrolled in phase II (Tr. 451). Offenders are required to accept responsibility in phase II for their crimes (Tr. 451). When he named the victims for which he had been convicted,

the group confronted him, saying that he had more victims (Tr. 451). When he admitted the offense for which he was charged but not convicted, the group said they were getting somewhere but wanted more names (Tr. 451). Mr. Smith told the jurors that he could have claimed as victims the other persons named in the records, but he did not molest them and if he admitted them he could have been prosecuted for crimes he did not commit (Tr. 451). The group setting became overwhelming and he dropped out (Tr. 451).

Mr. Smith again enrolled in MOSOP after the SVP law went into effect (Tr. 452). What was taught in phase I of the program was now very different from when he had taken it before (Tr. 454). Instead of a two-week course, phase I now lasted three months (Tr. 370, 453). Phase I teaches thinking errors and the principles used in phase II group therapy (Tr. 454). Thinking errors are things that sex offenders use to make themselves think that it is okay to have sex with children (Tr. 455). Telling himself that it was okay to have sex with Ms. Stone if he was more gentle with her than her former partners and that attempting to de-pants him was permission for sex were thinking errors (Tr. 455, 475). So, too, was telling Ms. Vance that her parents wanted her to learn about the things he was doing (Tr. 455). Participants in phase I write out daily reports of their thoughts, feelings, moods, and behaviors for evaluation of problem solving skills

(Tr. 454). Mr. Smith said that the new phase I provides the things a person needs to know so that the group experience in phase II is not so overwhelming (Tr. 454).

Mr. Smith acknowledged that to keep from re-offending a person needs a relapse prevention plan (Tr. 461). To prepare that plan the person needs to know about his crimes and the steps he took to get there, the seemingly unimportant errors made along the way (Tr. 462). Mr. Smith learned these things in the lengthened phase I and by talking to persons who had successfully completed the program (Tr. 462). A person's deviant cycle is what leads up to the actual offending (Tr. 462). It is comprised of four elements: pretend normal, build up, acting out, and justification (Tr. 462-463).

Pretend normal is where the person thinks everything is under control (Tr. 463). But Mr. Smith said that if you miss the triggers that lead to offending things start to build up (Tr. 463). One of his internal triggers is stress (Tr. 463). This stress led him to believe that it was okay to drink alcohol or consume drugs (Tr. 463). External triggers acting on his stress were everyday matters such as bills coming in or projects being unfinished (Tr. 463).

As the stress would build up Mr. Smith would begin closing himself off from people (Tr. 464). He started drinking alone and believing that everyone

was against him (Tr. 464). He would disregard his hygiene and housekeeping (Tr. 464).

Mr. Smith would then begin acting out (Tr. 465). Because he had closed himself off from adults, he let himself come into contact with children (Tr. 465). He would talk to them and try to develop their trust (Tr. 465). He would get them to show him their genitals as a sign of that trust (Tr. 465).

This acting out made Mr. Smith feel guilty and ashamed (Tr. 465). This led to the justification phase where he used more thinking errors and defense mechanisms to make himself feel better (Tr. 465). Denying to the police that he had molested Ms. Vance was a defense mechanism (Tr. 488). Telling the police that he was too drunk to remember what he had done to Connie and Jessica was another defense mechanism (Tr. 491).

Given what Mr. Smith learned about his deviant cycle he has been able to prepare a relapse prevention plan (Tr. 466). He intends to return to the out-patient sex offender group he attended in 1991 and 1992 (Tr. 466-467). Mr. Smith has a "core group" in place to provide support and intervention (Tr. 466). This group is comprised of his father, sister, brother, and a friend, Lynda Clark (Tr. 460). Each member of this core group has a copy of Mr. Smith's written plan to avoid re-offending, which includes his triggers, deviant cycle, a victim impact

statement, and "red flags" to alert them to potential relapse (Tr. 539). The members of his core group have a code word to use if they see Mr. Smith begin to get out of control which forces him to stop and explain himself to them (Tr. 467). Mr. Smith has empowered the group to have him detained or committed if they believe that is necessary (Tr. 467). He knows that as a pedophile he has the potential to offend at any time but he does not want to do so because he does not want to hurt another person in any way (Tr. 469). He avoided places where children might congregate, and even took someone with him when he went to the grocery store (Tr. 460-461).

Mr. Smith met Lynda Clark in 1993 while working on her house with his brother (Tr. 458-459). He told Ms. Clark up front that he was a convicted sex offender and could not be around children without supervision (Tr. 458-459). Mr. Smith sat down with Ms. Clark's family to discuss the situation because one of her three children was an eight year old girl and Ms. Clark intended to protect her family (Tr. 542-543). They all decided that Mr. Smith would not be in the house without adults present (Tr. 543). Mr. Smith used an entrance into the basement where he was working that did not bring him into the upstairs portion of the house, and he never entered the upstairs portion while he was working (Tr. 543).

Mr. Smith and Ms. Clark stayed in touch through letters and Christmas cards after he was returned to prison (Tr. 459, 545). When Mr. Smith was released from prison in 1999, he returned to live with his father, and he started working for Ms. Clark (Tr. 457). Ms. Clark had discussed in her letters repair and improvement problems she had with her home, and Mr. Smith provided advice to her (Tr. 546-547). After his release, Mr. Smith offered to remodel a room in Ms. Clark's house (Tr. 547). He did such a good job that Ms. Clark thought that they could find similar work for Mr. Smith to engage in (Tr. 547). The two became more open with each other (Tr. 547). Mr. Smith appeared to need someone to talk to (Tr. 547). Mr. Smith discussed his offenses and generally described them, and why he had been sent back to prison (Tr. 548). They also discussed Mr. Smith's fears and anything else he wanted to talk about (Tr. 548).

Ms. Clark saw Mr. Smith every day because she arranged jobs for him and kept the tools at her house (Tr. 549). Mr. Smith carried insurance on his business activities and on the truck he used to get to the jobs (Tr. 551). He seemed more focused than Ms. Clark had seen him before, and he seemed to know what he wanted to do (Tr. 552). He re-evaluated everything he did and always looked ahead before acting (Tr. 553). Ms. Clark always checked to see if children would be present at a job site and she went with him if children would be present (Tr.

551). Mr. Smith also avoided shopping malls and kid-type restaurants (Tr. 553). Ms. Clark had asked Mr. Smith to go to some places that he would refuse to go in order to protect himself from possibly re-offending (Tr. 553). She had once mentioned going dancing but Mr. Smith refused to go into a bar (Tr. 549).

Ms. Clark has remained in contact with Mr. Smith since he was detained in the treatment center awaiting trial (Tr. 552). In order to be more aware of Mr. Smith's situation, Ms. Clark keeps up with discussions on an internet site regarding the pros and cons of civil commitment of sexual offenders (Tr. 554). Discussions on that site also involve general information, psychiatric needs and treatment options (Tr. 554, 556). Ms. Clark follows these discussions so that she can identify danger signals (Tr. 557). She has discussed with Mr. Smith what she has learned on the internet site and things he should do when he is released (Tr. 557). Ms. Clark intends to see that Mr. Smith is employed (Tr. 559). She would encourage him to see a counselor and get treatment (Tr. 559). Mr. Smith's relapse prevention plan provides her with information about his triggers and deviant cycle so that Ms. Clark can see them if they begin and be able to help Mr. Smith (Tr. 560). If she saw his deviant cycle begin by keeping to himself, not talking, being secretive, drinking, or ignoring his hygiene she would insist that he put himself back into a sex offender group (Tr. 560). She and Mr. Smith's family can

all pull together so that Mr. Smith can open up to them about his problems (Tr. 561). Ms. Clark has the address of a Sexaholics Anonymous in Kansas City and Mr. Smith's core group intends to see that he enters that program (Tr. 562).

Ms. Clark admitted in cross-examination that she did not initially look for Mr. Smith when he left Missouri (Tr. 577-578). Mr. Smith had indicated that he needed to get away after being in prison, and that he was going to look at some scenery and maybe do some fishing (Tr. 576). Mr. Smith's father called Ms. Clark to say that Mr. Smith had left a note saying that he was going on a vacation (Tr. 577). Ms. Clark had Mr. Smith's cell phone and pager numbers if she needed to contact him (Tr. 577). She figured that Mr. Smith was a grown man and could go where he wanted (Tr. 577). Ms. Clark found out the next morning that the authorities were looking for Mr. Smith (Tr. 577). Mr. Smith did not answer his cell phone nor respond to his pager (Tr. 578).

Mr. Smith acknowledged in cross-examination that he has not done the detailed self-reporting and group interaction under the supervision of a trained therapist as is done in phase II of MOSOP (Tr. 526-527). He agreed that his relapse plan has not been reviewed by a therapy group or a therapist (Tr. 530-532). He also acknowledged that he has not completed a specific sexual offender treatment program (Tr. 533-534).

Mr. Smith filed a motion prior to trial to preclude the State from arguing that the purpose of the sexually violent predator law is for treatment (L.F. 105-109). He alleged that a treatment purpose is irrelevant to the only decision properly before the jurors: whether he is a sexually violent predator (L.F. 105-109). He also filed a pre-trial motion to dismiss the petition because the SVP law requires that the jurors be instructed that if they find him to be a sexually violent predator he will be committed to the Department of Mental Health for care, control and treatment, an unconstitutional deprivation of his rights to due process of law and a fair trial before a fair and impartial jury (L.F. 110-112). He renewed both objections during the instruction conference, and objected to submission of Instruction No. 6, which read: "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the custody of the director of the department of mental health for control, care and treatment." (Tr. 407-410, L.F. 190). Mr. Smith offered Instruction No. I as an alternative to Instruction No. 6, arguing that if a treatment instruction is given it should set out the complete law of what happens following an SVP commitment:

> If you find respondent to be a sexually violent predator, he shall be committed to the custody of the director of the department of mental health for control, care and treatment. There is no maximum period of

such commitment. Respondent shall remain so committed until a later, separate jury unanimously determines that his mental abnormality has so changed that he is safe to be at large and will not engage in acts of sexual violence if released.

(Tr. 409-410, L.F. 200). Mr. Smith also objected to the verdict form offered by the State, which read:

> We, the jury, find that respondent Kenneth F. Smith _____(here insert either "should" or "should not") be committed to the Department of Mental Health for control, care and treatment as a sexually violent predator.

(Tr. 410-411, L.F. 201). Mr. Smith offered a verdict form which he believed presented the proper question for the jurors: "We, the jury, find that Kenneth Smith _____(insert "is" or "is not") a sexually violent predator as submitted in Instruction No. ____ [the verdict director]." (Sup.L.F. 1). The probate court overruled Mr. Smith's objections and offers, and submitted to the jurors Instruction No. 6 and the verdict form offered by the State (Tr. 410-411).

The State argued to the jurors in closing that it had met the fourth element necessary to commit Mr. Smith, that he was more likely than not to re-offend, by showing that Mr. Smith had five opportunities for treatment but had not taken

advantage of them (Tr. 595, 597). It reminded the jurors that Dr. Birmingham had said that Mr. Smith did not seem to think he needed treatment, and called Mr. Smith's relapse plan "laughable" (Tr. 597-598).

Mr. Smith reminded the jurors that the issue before them was not treatment (Tr. 610). The issue to be decided was whether Mr. Smith was a sexually violent predator (Tr. 610). Mr. Smith recalled Dr. Birmingham's testimony that failure to complete treatment was not a risk factor, only termination from treatment and Mr. Smith was never terminated from treatment (Tr. 610). Lack of treatment does not make someone a sexually violent predator under the statute (Tr. 610).

The State retorted that Mr. Smith got scared and fled Missouri "because he was going to be made to go to treatment and he knew that." (Tr. 615). It argued that after offending and re-offending, Mr. Smith refused treatment (Tr. 616). The State argued that it is not enough for a person to know his deviant cycle and everything else related to relapse prevention (Tr. 621). It suggested that, "[i]t's a matter of having that plan supervised and other people seeing in you that you have really changed." (Tr. 621).

During deliberations the jurors requested the "[l]egal definition of a sexually-violent predator which includes, quotes, mental abnormality. We

believe this statute was part of Mr. Hansen's chart." (Tr. 622-623). The court advised the jurors that the State's chart was not received in evidence and they were to be guided by the instructions given to them (Tr. 623-624). The jurors returned a verdict finding that Mr. Smith "should be committed to the Department of Mental Health for control, care and treatment as a sexually violent predator." (L.F. 201). The probate court entered a judgment that Mr. Smith "has been found, beyond a reasonable doubt, to be a sexually violent predator," and ordered him to be "committed to the custody of the director of the Department of Mental Health for control, care and treatment until such time as [his] mental abnormality has so changed that he is safe to be at large." (L.F. 228).

POINTS RELIED ON

I.

The probate court erred in committing Mr. Smith to indefinite secure confinement in the custody of the Department of Mental Health, in violation of Mr. Smith's right to due process of law and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Smith is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility because the jury's verdict elevated speculation regarding his potential for future behavior over inferences reasonably drawn from the evidence presented which demonstrated a low risk of re-offending in a sexually violent manner.

In the Interest of Kochner, 662 N.W.2d 195 (Neb. 2003);

In the Matter of the Care and Treatment of Coffel, 117 S.W.3d 116 (Mo. App., E.D. 2003);

State v. Grim, 854 S.W.2d 403 (Mo. banc 1993);

State v. Huss, 666 N.W.2d 152 (Iowa 2003);

United States Constitution, Fifth, Sixth, and Fourteenth Amendments; and Missouri Constitution, Article I, Sections 10, 18(a).

II.

The probate court erred in denying Mr. Smith's motion to dismiss the State's petition because the requirement of Section 632.492, RSMo Cum. Sup. 2003, that the court instruct the jurors that if they found Mr. Smith to be a sexually violent predator he would be "committed to the custody of the director of the department of mental health for control, care and treatment" violated Mr. Smith's rights to due process of law and a fair trial before a fair jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18(a) and 22(a) of the Missouri Constitution, in that the required instruction injects irrelevant matters into the juror's consideration and fails to fully advise the jurors of the consequences of their verdict and therefore it is an incorrect statement of the law misleading the jurors and minimizing their sense of responsibility in the consequences of their verdict.

People v. Rains, 75 Cal.App.4th 1165 (Cal. App., 1999);

In the Matter of the Treatment of Lair, 11 P.3d 517 (Kan. App., 2000);

State v. Carson, 941 S.W.2d 518 (Mo. banc 1997);

U.S. v. Darden, 70 F.3d 1507 (8th Cir. 1995); and

Sections 632.492, .495, RSMo Cum. Supp. 2003.

III.

The probate court erred in submitting over Mr. Smith's objection Instruction No. 6, instructing the jurors, "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the director of the department of mental health for control, care and treatment," because the instruction denied him his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the sole responsibility of the jurors is to determine whether Mr. Smith is a sexually violent predator, not what occurs following such finding; which permitted the jurors to return a verdict which did not answer the proper, necessary, and ultimate question in the case, and informing the jurors that the purpose of the law is "treatment" minimizes the sense of responsibility for the jurors in determining whether Mr. Smith is a sexually violent predator.

In the Matter of the Care and Treatment of Lair, 11 P.3d 517 (Kan. App., 2000);

People v. Rains, 75 Cal.App.4th 1165 (Cal. App., 1999);

State v. Stutts, 723 S.W.2d 594 (Mo. App., W.D. 1987);

State v. Carson, 941 S.W.2d 518 (Mo. banc 1997); and

Sections 632.495, .498, .501, .504, RSMo 2000.

IV.

The probate court erred in submitting the verdict form offered by the State and in entering a judgment committing Mr. Smith to secure confinement in the Department of Mental Health as a sexually violent predator, in violation of his rights to due process of law and to a trial by a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that the jury did not return a verdict finding the necessary elements required by Section 632.480(5), RSMo Cum. Supp. 2003; that Mr. Smith has been found guilty of a sexually violent offense, suffers a mental abnormality affecting his emotional or volitional capacity predisposing him to commit sexually violent offenses, and which makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

In the Matter of the Care and Treatment of Lair, 11 P.3d 517 (Kan. App., 2000);

Morse v. Johnson, 594 S.W.2d 610 (Mo. banc 1982);

People v. Rains, 75 Cal.App.4th 1165 (Cal. App., 1999);

State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a), and 22(a);

Section 632.495, RSMo 2000;

Section 632.480, RSMo Cum. Supp. 2003; and

Missouri Approved Instructions, 31.14, 36.18.

ARGUMENT

I.

The probate court erred in committing Mr. Smith to indefinite secure confinement in the custody of the Department of Mental Health, in violation of Mr. Smith's right to due process of law and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Smith is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility because the jury's verdict elevated speculation regarding his potential for future behavior over inferences reasonably drawn from the evidence presented which demonstrated a low risk of re-offending in a sexually violent manner.

To commit Mr. Smith to indefinite, secure confinement in the Department of Mental Health as a sexually violent predator, the State must prove beyond a reasonable doubt that he (1) has a congenital or acquired condition affecting his emotional or volitional capacity that predisposes him to commit sexually violent offenses to a degree that causes him serious difficulty controlling his behavior,

and (2) that he is more likely than not to engage in predatory acts of sexual violence if not confined. ***Thomas v. State***, 74 S.W.3d 789, 791-792 (Mo. banc 2002); ***In the Matter of the Care and Treatment of Coffel***, 117 S.W.3d 116, 121 (Mo. App., E.D. 2003). The standard of review for sufficiency of the evidence in a jury-tried civil case is to consider the evidence and reasonable inferences there from in the light most favorable to the verdict while disregarding unfavorable evidence and inferences. ***In re the Care and Treatment of Cokes***, 107 S.W.3d 317, 321 (Mo. App., W.D. 2003).

Dr. Birmingham diagnosed Mr. Smith with pedophilia based on his three convictions for sexual offenses against children (Tr. 243).). That diagnosis alone does not make Mr. Smith a sexually violent predator (Tr. 320). But Dr. Birmingham opined that the disorder was a mental abnormality in Mr. Smith's case (Tr. 277). He found that the condition caused Mr. Smith serious difficulty controlling his behavior because he offended under circumstances where he could be caught (Tr. 260), his offenses were impulsive (Tr. 261), he offended while on parole and under supervision (Tr. 260), and he failed to comply with conditions of probation (Tr. 265, 268-270, 268). Dr. Birmingham said that Mr. Smith was more likely than not to re-offend if not confined in a secure facility based a lot on his past behavior (Tr. 279). He also based this opinion on the fifty-

two percent base rate for re-offense by child molesters (Tr. 279-280), the wide age range of the children's ages (Tr. 290), the presence of a deviant sexual preference – pedophilia (Tr. 290), one incident of non-sexual violence (Tr. 292-293), impulsivity in one incident (Tr. 296-297), offending under supervision, and in places where he could get caught (Tr. 297-298), threatening or using force against his victims in 1992 by telling them not to tell what he did (Tr. 298-299), engaging in a variety of acts (Tr. 298-299), use of alcohol disinhibiting his behavior (Tr. 299), and employment of less than a year (Tr. 300). Mr. Smith's actuarial scores corresponded to groups of individuals who where re-arrested or re-convicted at rates from twenty-nine percent in fifteen years to one hundred percent in six years (Tr. 303, 304), He had not completed MOSOP and according to the records did not appear to think he needed treatment (Tr. 306-308, 309).

But this is not the end of an appellate court's responsibility in reviewing a verdict for sufficient evidence. Judge Wolff noted in ***In the Matter of the Care and Treatment of Norton***, 123 S.W.3d 170, 177-178 (Mo. banc 2003), that the "elephant in the room" is the conviction of sexual offenses involving children. The reprehensible nature of such offenses "makes the observance of constitutional safeguards very difficult." ***Id.*** Jurors are unwilling to free someone who may some day molest another child, even if there is doubt whether

the person has a mental abnormality. ***Id.*** Judge Wolff cautioned, "The state is, of course, required to prove its case for commitment 'beyond a reasonable doubt.' But in this context, is this much of a safeguard?" ***Id.***

Inferences contrary to the verdict cannot be ignored by the reviewing court if they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them, or if they would necessarily give rise to a reasonable doubt in a reasonable juror's mind. ***State v. Grim***, 854 S.W.2d 403, 411, 414 (Mo. banc 1993). The Western District cautioned in ***Hoskins v. Business Men's Assurance***, 116 S.W.3d 557, 565 (Mo. App., W.D. 2003), "We will not … supply missing evidence or give [plaintiffs] the benefit of unreasonable, speculative, or forced inferences.'" Nor are the jurors themselves allowed to render verdicts based on speculation. "It is not the function of the court to decide disputed facts; it is rather the court's function to assure that the jury, in finding the facts, does not do so based on sheer speculation." ***Grim***, 854 S.W.2d at 414.

Dr. Birmingham certainly cannot predict what Mr. Smith will do in the future, he can only presume to speculate about future events considering past events and research studies. Pedophilia alone does not meet the requirement for civil commitment (Tr. 321). Additional reasons are required (Tr. 257). Many of

the reasons upon which Dr. Birmingham speculated that Mr. Smith will re-offend in the future were based on the circumstances of the past incidents. His opinion was based on the location of the past offenses (Tr. 260), the impulsivity of the 1992 incidents (Tr. 261), the incidents involved "threats" or "force" (Tr. 298-299), the ages of the children (Tr. 290), and variety of acts (Tr. 298-299). Dr. Birmingham also relied on non-sexual behaviors while on parole or probation (Tr. 260, 268-270, 292-293, 297-298). But the events Dr. Birmingham relied upon occurred between 1988 and 1994 (Tr. 244, 354-355). And there were no acts of sexual offending since 1992 (Tr. 349, 381, 385). The jurors were therefore left to compare Mr. Smith's pedophilic behavior from 1988 to 1992 with his behavior that avoided pedophilic activities from 1992 to 1999 to speculate regarding his pedophilic behaviors from 2002 into the future.

Forcible civil commitment is permitted of persons who have a mental abnormality and are unable to control their behavior, thereby posing a danger to public health and safety. ***Kansas v. Hendricks***, 521 U.S. 346, 357, 117 S.Ct. 2072, 2079, 138 L.Ed.2d 501 (1997). But it is only permissible to confine those persons "who, by reason of a mental disease or abnormality, constitute a *real, continuing, and serious danger to society*." ***Id.***, 521 U.S. at 372, 117 S.Ct. at 2087 (Justice

Kennedy, concurring) (emphasis added). This requires a certain currency or immediacy of the danger.

This constitutional requirement has been specifically incorporated into a number of state statutes civilly confining sexually violent predators. The appellant in ***In the Interest of Kochner***, 662 N.W.2d 195, 198 (Neb. 2003), had been incarcerated for sexual assault of a child, and then was civilly committed as a sexually violent predator. He did not challenge his mental illness, pedophilia, but challenged the finding that he presented a substantial risk of harm to others. ***Id***. at 201. The Nebraska statute requires the State to prove that the person presents a "substantial risk of serious harm to another person or persons within the near future *as manifested by evidence of recent violent acts*." ***Id***. (emphasis in opinion). As the Nebraska Supreme Court explained in ***Kochner***, "[t]o confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the *recent past* and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or another." ***Id***. (emphasis added).

The Nebraska Court addressed the lack of acts of sexual violence, as defined by the SVP statute, while a person is incarcerated. The Court recognized that there is no definite time-oriented period by which to determine if an act is

recent, and that each case must be decided by its own circumstances. 662 N.W.2d at 203. Relying on a prior case, the Nebraska Supreme Court noted that the appellant, as an incarcerated person, did not have the ability to engage in the sexually violent acts that result from his pedophilia. ***Id***. This "inability to reoffend while he was incarcerated" was relevant to determining that the underlying criminal offense was a sufficiently recent overt act. ***Id***. By contrast, Mr. Smith was in the community for almost two years after his most recent act of sexual violence. As such, he had the ability to engage in acts of sexual violence, and he did not do so. Thus, the last act of sexual violence was too remote to establish a current danger from his mental abnormality.

While not involving a civil commitment as a sexually violent predator, the decision of the Iowa Supreme Court in ***State v. Huss***, 666 N.W.2d 152 (Iowa 2003), is instructive. Huss was found not guilty by reason of a mental disease or defect. ***Id***. at 155. After seventeen years he sought release from the State mental institution. ***Id***. The evidence supported the conclusion that Huss continued to have a mental illness, though in remission. ***Id***. at 156-157. Two doctors testified that Huss was a danger to himself or others because both said "the best predictor of future behavior is past behavior." ***Id***.

The Iowa Supreme Court noted that "[t]o confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the *recent* past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or another." 666 N.W.2d at 161.[2] Proof of dangerousness calls for a predictive judgment based on past conduct, but must be ultimately grounded on future, not past, danger. ***Id***.

Mr. Smith is not arguing that Section 632.495 must contain a specific element of a "recent overt act" like the foreign statutes. He is simply arguing the nature of the required proof necessary to establish future danger. Mr. Smith's argument is similar to that put forward by the majority of the Missouri Supreme Court in ***Thomas v. State***, ***supra***. Following the opinion of the United States Supreme Court in ***Kansas v. Crane***, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), the Missouri Supreme Court held that the definition of a mental abnormality set out in Section 632.480(2) required a finding of serious difficulty controlling behavior. ***Thomas***, 74 S.W.3d at 791. The statutory definition of a mental abnormality is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit

[2] This mirrors the proof required by the ***Kochner*** Court, supra.

sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Section 632.480, RSMo 2000, and RSMo Cum. Sup. 2003. The Missouri Supreme Court did not declare the statute to be unconstitutional. ***Id***. at 792. Rather, the Court concluded that it was enough simply to require "serious difficulty controlling behavior" to be included in the instruction submitted to the jurors. ***Id***. This approach, using the instruction to comply with the requisite finding mandated by the United States Supreme Court, was criticized by Judge Limbaugh in dissent. ***Id***. at 792. His view was that the "serious difficulty controlling behavior" requirement necessitated amendment of the statute, not just inclusion of the term in the definition of a mental abnormality contained in a jury instruction. ***Id***. at 793. The majority disagreed, believing that the required language was only a refinement of the statutory language, not the addition of a new statutory element. ***Id***. at 791, fn 1.

Hendricks requires the state's evidence to establish a "real, continuing, and serious danger to society." ***Id***. 521 U.S. at 372, 117 S.Ct. at 2087. As with ***Thomas***, this does not require a recent over act to be included in the language of the statute. It does require that such real, continuing, and *current* danger be established by proof giving rise to a reasonable belief that the person's behavior will continue to be dangerous in the future. This is established by recent conduct

or behavior. It is not established by evidence of behavior in the remote past and expert speculation that Mr. Smith is the same today as he was then, when Mr. Smith did not engage in predatory acts of sexual violence in the two years that he was not confined in a secure facility.

An expert's opinion of future behavior based on statistical research, with which the State seeks to overcome two years of non-offending in the community, is insufficient to prove a real and actual danger in the future. The ***Huss*** Court relied on the opinion of the New York Court of Appeal in ***In re George L.***, 648 N.E.2d 475, 478 (N.Y. App., 1995), that a finding of current dangerousness "must be based on more than expert speculation that the [person] poses a risk of relapse or reverting to violent behavior once medical treatment and supervision are discontinued." 666 N.W.2d at 162. Neither the nature of the prior act "nor the statistical probability of relapse, standing alone," is sufficient to establish current danger. ***Id***. Dr. Birmingham's reliance on base-rates of child molester re-offending and the risk percentages derived from the actuarial instruments are insufficient to establish the future danger necessary for a civil commitment.

Mr. Smith recognizes that the Southern District Court of Appeals found ***In the Matter of the Care and Treatment of Whitnell***, 129 S.W.3d 409, 415-416 (Mo. App., S.D. 2004), that the psychiatrist's testimony was sufficient to support the

verdict. The Court relied in part on ***Barefoot v. Estelle***, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). ***Id.*** The United States Supreme Court in ***Barefoot*** upheld the *admission* of psychiatric or psychological testimony regarding future behavior, but did not hold that all such testimony was sufficient as a matter of law to support a verdict. On this latter issue, the substantial weakness of predictions of future behavior discussed by the United States Supreme Court is very important. The majority justices would admit the testimony, recognizing that, "[n]either petitioner nor the [American Psychiatric] Association suggests that psychiatrists are always wrong with respect to future dangerousness, *only most of the time*." 103 S.Ct. at 3398 (emphasis added). The evidence demonstrated that psychiatric predictions of future behavior are wrong two times out of three. 103 S.Ct. at 3406. In other words, clinical judgment that an individual will engage in dangerous behavior in the future is wrong more often than right. That such evidence may be admissible at trial does not make it sufficient to justify the deprivation of an individual's liberty. But this is the evidence upon which the jurors had to rely to return its verdict against Mr. Smith. This cannot be sufficiently substantial evidence upon which the jurors could find Mr. Smith to be a sexually violent predator without substituting speculation for fact.

The State's approach premises this current danger upon Mr. Smith's ten year old offenses plus his failure to complete a state approved treatment program. This approach is inapposite because civil commitment is not permitted simply because the person has not successfully completed treatment, nor is a committed person released when he has successfully completed it. Dr. Birmingham did not consider Mr. Smith's failure to compete sex offender treatment to be a factor increasing his risk because it has only a minor relationship to risk of re-offending (Tr. 312). One study indicates that treatment failure is not a risk factor at all (Tr. 367). But the State gained Mr. Smith's secure confinement by persuading the jurors that Mr. Smith needs a state-approved, supervised treatment, he has not taken advantage of the opportunities to complete the State's MOSOP program, and therefore should be committed and forced to complete the MSOTC program (Tr. 597, 615, 616, 621). It is not simply treatment or the lack of treatment which determines whether a person may be civilly committed. It is behavior creating a danger that justifies commitment. Dr. Birmingham and the State speculate from incriminating facts in the past what Mr. Smith will do in the future. Mr. Smith relies on his *actual* behavior in the most recent past that even without completion of MOSOP or MSOTC he has been able to control his behavior and prevent himself from re-offending. This is

the most probative fact in this case. And yet the jurors rejected this established fact in favor of pure speculation based on remote behavior and statistical probabilities. The State's evidence is insufficient to support Mr. Smith's involuntary commitment.

Mr. Smith' *actual* behavior while in the community was rejected by the jurors in favor of a prediction of potential behavior. In doing so, they unreasonably disregarded evidence which must "necessarily give rise to a reasonable doubt," and this Court must reverse Mr. Smith' commitment to "assure that the jury, in finding the facts, [did] not do so based on sheer speculation." ***Grim***, 854 S.W.2d at 413-414.

II.

The probate court erred in denying Mr. Smith's motion to dismiss the petition because the requirement of Section 632.492, RSMo Cum. Sup. 2003, that the court instruct the jurors that if they find Mr. Smith to be a sexually violent predator he would be "committed to the custody of the director of the department of mental health for control, care and treatment" violated Mr. Smith's rights to due process of law and a fair trial before a fair jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18(a) and 22(a) of the Missouri Constitution, in that the required instruction injects irrelevant matters into the case and fails to fully advise the jurors of the consequences of their verdict and therefore is an incorrect statement of the law misleading the jurors and minimizing their sense of responsibility in the consequences of their verdict.

Section 632.492, RSMo Cum. Supp. 2003, requires: "If the trial is held before a jury, the judge shall instruct the jury that if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment." Mr. Smith filed a motion prior to trial to dismiss the petition filed against him by the

State because the instruction forced upon the trial court and jurors by the legislature injects irrelevant matters into the jury's consideration, is misleading, and relieves the jury of its responsibility in the case, thereby depriving him of due process of law as guaranteed by the United States and Missouri Constitutions (L.F. 105-109, 110-112).[3] The probate court denied the motion and submitted the instruction as directed by the legislature (L.F. 190).

"[N]or shall any state deprive any person of … liberty … without due process of law." United States Constitution, Fourteenth Amendment. Civil commitment of persons classified as sexually violent predators impinges on the fundamental right of liberty. ***In the Matter of the Care and Treatment of Norton,*** 123 S.W.3d 170, 173 (Mo. banc 2003). "[E]ven in civil proceedings for involuntary commitment," the person whose commitment is sought has a "liberty [interest] protected by the Due Process clause from arbitrary governmental action." ***In re Salcedo***, 34 S.W.3d 862, 867 (Mo. App., S.D. 2001). Procedural due process requires that government action depriving a person of liberty must be implemented in a fair manner. ***United States v. Salerno***, 481 U.S. 739, 746, 107

[3] Mr. Smith incorporated in his motion to dismiss the arguments presented in his motion in limine to preclude the State from arguing that the purpose of the SVP law is treatment (L.F. 110-110).

S.Ct. 2095, 95 L.Ed.2d 697 (1987). Jury instructions must satisfy the requirements of due process. ***Commitment of Laxton***, 647 N.W.2d 784, 795 (Wisc. 2002).

The legislature has specified what happens to a person found to be a sexually violent predator: "If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of mental health for control, care and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large." Section 632.495, RSMo Cum. Sup. 2003. But the legislature chose to inform the jurors of only a portion of this consequence: "If the trial is held before a jury, the judge shall instruct the jury that if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment." Section 632.492. Not only are the jurors denied the knowledge that the person remains committed until his mental abnormality has changed, not just until he completes treatment, but neither are they told that the person remains committed until another jury in another trial concludes beyond a reasonable doubt that the person's mental abnormality has so changed. See Sections 632.498 and 632.501, RSMo 2000. The instruction forced upon the probate court and the jurors is an

incomplete statement of the substantive law that misleads the jurors into believing that upon completion of treatment the person is released.

Jury instructions must fairly and adequately contain the law applicable to the case. ***U.S. v. Darden,*** 70 F.3d 1507, 1541 (8th Cir. 1995). The jury must be instructed in a manner consistent with the substantive law. ***State v. Carson,*** 941 S.W.2d 518, 520 (Mo. banc 1997). If an instruction submits an incorrect statement of the law and the error has a substantial potential for prejudicial effect, the appellate court must reverse. ***Van Vacter v. Hierholzer***, 865 S.W.2d 355, 358 (Mo. App., W.D. 1993). Prejudicial error occurs when the jury may have been adversely influenced by an erroneous instruction. ***State v. Levesque***, 871 S.W.2d 87, 90 (Mo. App., E.D. 1994).

Mr. Smith was prejudiced in a couple of different ways by the incomplete and misleading instruction forced upon the trial court and jury by the legislature. First, the only question presented to the jurors is whether the person is or is not a sexually violent predator. "The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Section 632.495. It is irrelevant to the question presented to the jurors that persons committed as sexually violent predators are provided treatment. ***In the Matter of the Treatment of Lair***, 11 P.3d 517, 519 (Kan.App., 2000); ***People v. Rains***, 75

Cal.App.4th 1165, 1171, (Cal.App., 1999). Jury instructions should not be misleading. ***State v. Levesque***, ***supra***.

The second way Mr. Smith was prejudiced by the instruction compelled by the legislature is that it minimizes the jurors' sense of responsibility in their verdict. Not only may the jurors be misled into believing that Mr. Smith will be released as soon as he completes the Department of Mental Health's sexual offender treatment program, but they may be more inclined in the first instance to commit a person for treatment than for confinement. This impact is similar to that reflected in explanations offered by the State in certain ***Batson*** cases. In ***State v. Rogers***, 753 S.W.2d 607, 611 (Mo. App., E.D. 1988), the State used a peremptory strike against a nurse, a typical use of its strikes, because the prosecutor "feared that, as a nurse at a state mental institution, she might be sympathetic to" the young defendant who had already spent time in prison. In ***State v. Butler***, 731 S.W.2d 265, 272 (Mo. App., W.D. 1987), the State used a peremptory strike against a nurse because it was the prosecutor's "experience that nurses were compassionate and thus inclined to feel sorry for defendants." These explanations offer examples of the State's awareness of the conflict between compassion for individuals shown by "treatment" providers and incarceration of the person the State has brought charges against. The State is

aware that compassion and sympathy may stand in the way incarceration. In SVP cases, with the help of the legislature, the State can tap into the compassion and sympathy to gain the respondent's "treatment" without the burden of focusing on "secure confinement."

Section 632.492 requires the probate court to submit to the jurors an instruction injecting irrelevant matters into their consideration, misleading them as to the full consequences of their verdict imposed by the substantive law, and which has a substantial probability of minimizing their sense of responsibility in their verdict. The statutorily required instruction violates Mr. Smith's constitutional rights to due process of law and a fair trial before a fair jury. Section 632.492 is unconstitutional and the probate court erred in denying Mr. Smith's motion to dismiss the petition filed against him. The judgment of the probate court must be reversed and Mr. Smith must be discharged.

III.

The probate court erred in submitting over Mr. Smith's objection Instruction No. 6, instructing the jurors, "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the director of the department of mental health for control, care and treatment," because the instruction denied him his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the sole responsibility of the jurors is to determine whether Mr. Smith is a sexually violent predator, not what occurs following such finding; which permitted the jurors to return a verdict which did not answer the proper, necessary, and ultimate question in the case, and informing the jurors that the purpose of the law is "treatment" minimizes the sense of responsibility for the jurors in determining whether Mr. Smith is a sexually violent predator.

"The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Section 632.495, RSMo Cum. Supp. 2003. The questions for the jurors are: 1) does the person have a congenital or acquired condition affecting emotional or volitional capacity that predisposes the

person to commit sexually violent offenses to a degree that causes serious difficulty in controlling behavior; and (2) that the person is more likely than not to engage in predatory acts of sexual violence if not confined. ***Thomas v. State***, 74 S.W.3d 789, 791-792 (Mo. banc 2002). These questions were presented to the jurors in Instruction No. 5. (L.F. 189).

The legislature requires an additional instruction to be given to the jurors. "If the trial is held before a jury, the judge shall instruct the jury that if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the Department of Mental Health for control, care and treatment." Section 632.492, RSMo Cum. Supp. 2003. Mr. Smith objected to submission of such an instruction (Tr. 407-410). The probate court overruled Mr. Smith's objection and the instruction was submitted to Mr. Smith's jurors as Instruction No. 6:

> If you find Respondent to be a sexually violent predator, Respondent shall be committed to the custody of the director of the Department of Mental Health for control, care and treatment.

(Tr. 410, L.F. 190). This information is irrelevant to the issues to be determined by the jurors.

The respondent to the SVP petition in ***In the Matter of the Treatment of Lair***, 11 P.3d 517, 519 (Kan.App., 2000), sought to present evidence that he could be accepted in a private, out-patient sexual offender treatment program to establish that he did not need to be confined as a sexually violent predator. The question on appeal was whether the evidence was relevant and admissible. ***Id***. The Kansas Court held that the evidence was irrelevant and was properly excluded because, "[t]he statute provides that a jury is only to determine whether the individual is a sexually violent predator. The jury is not concerned with and does not determine the course of treatment for a sexually violent predator." ***Id***. Therefore, the treatment of a sexually violent predator was "not a material fact before the jury." ***Id***. at 519-520.

The opposite situation arose in ***People v. Rains***, 75 Cal.App.4th 1165, 1171, (Cal.App., 1999), when the State of California presented evidence that if Rains was committed he would receive treatment in a psychiatric facility, and would be subject to a commitment review every two years. The California Court noted that the questions before the jurors were whether the defendant had a diagnosed mental disorder and whether that disorder made the defendant a danger to others because he was likely to engage in sexually violent criminal behavior. ***Id***. at 1170. That the defendant would receive treatment in a psychiatric facility has

"no relevance to either of these issues." ***Id***. The Court found no basis for a reversal, however, because the testimony was "relatively brief;" the trial court instructed the jurors, "In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict." and; the prosecuting attorney told the jurors, "it is not your function to decide what should happen" to Rains. ***Id***. at 1171.

The Missouri legislature has demanded that a probate court do exactly the sort of things that were missing in ***Rains*** and which led to the Court's conclusion that the irrelevant evidence was not prejudicial. The ***Rains*** jury was advised by the court that the penalty or punishment must not affect the verdict. Missouri jurors do not decide what is to happen to a sexually violent predator, but the probate court is required to inform them of what will happen if the person is found to be a sexually violent predator. Because the statute requires that the jurors be informed of the commitment for control, care and treatment, the State argued that the purpose of the law is to secure treatment for Mr. Smith. The State argued to the jurors in closing that it had met the fourth element necessary to commit Mr. Smith, that he was more likely than not to re-offend, by showing that Mr. Smith had five opportunities for treatment but had not taken advantage of them (Tr. 595, 597). It reminded the jurors that Dr. Birmingham had said that Mr.

Smith did not seem to think he needed treatment, and called Mr. Smith's relapse plan "laughable" (Tr. 597-598). The State supposed that Mr. Smith got scared and fled Missouri "because he was going to be made to go to treatment and he knew that." (Tr. 615). It argued that after offending and re-offending, Mr. Smith refused treatment (Tr. 616). The State argued that it is not enough for a person to know his deviant cycle and everything else related to relapse prevention (Tr. 621). It suggested that, "[i]t's a matter of having that plan supervised and other people seeing in you that you have really changed." (Tr. 621). Treatment is irrelevant to the question before the jurors, and it is not the justification for secure confinement. ***Lair***, ***supra***.; ***Rains***, ***supra***. But that is exactly why the State asked the jurors to commit Mr. Smith, relying on the instruction forced upon the jurors by the legislature.

Instruction No. 6 does not follow an approved instruction, because there is not one, but followed the language required by the statute. The use of an approved instruction or one properly modified to fit the particular case, must submit only ultimate factual issues to the jurors, avoiding evidentiary detail that might otherwise confuse the issues. ***Alcorn v. Union Pacific R.R. Co.***, 50 S.W.3d 226, 241 (Mo. banc 2001). The Kansas statute considered by the United States Supreme Court in ***Kansas v. Hendricks***, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d

501 (1997), is identical to Section 632.495, RSMo Cum. Supp. 2003, that "[i]f the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large." 117 S.Ct. at 2077. In spite of this legislatively espoused "purpose," the United States Supreme Court held that treatment is only an "ancillary goal" of the law, and that the "continued segregation of sexually violent offenders" is the "overriding concern." 117 S.Ct. at 2084. This is equally apparent in Missouri because the statutes condition release upon finding that the person is safe to be at large, not that he has successfully completed treatment. See Sections 632.495, 632.498, 632.501, and 632.504, RSMo 2000. Mr. Smith's treatment was not an ultimate factual issue for the jurors, but Instruction No. 6 certainly put that issue before them.

The question then is whether Mr. Smith was prejudiced by the instruction. ***Cluck v. Snodgrass***, 381 S.W.2d 544, 551, (Mo. App., Springfield District 1964); ***Davis v. Kansas City Public Service Co.***, 233 S.W.2d 679, 681-682 (Mo. 1950). Focusing the result of the verdict on something benign and beneficial, treatment, has a much greater likelihood of serving the State's efforts to confine Mr. Smith

in a secure facility than focusing the jurors on the secure confinement that would also follow from their verdict. This impact is similar to that reflected in explanations offered by the State in certain ***Batson*** cases. In ***State v. Rogers***, 753 S.W.2d 607, 611 (Mo. App., E.D. 1988), the State used a peremptory strike against a nurse, a typical use of its strikes, because the prosecutor "feared that, as a nurse at a state mental institution, she might be sympathetic to" the young defendant who had already spent time in prison. In ***State v. Butler***, 731 S.W.2d 265, 272 (Mo. App., W.D. 1987), the State used a peremptory strike against a nurse because it was the prosecutor's "experience that nurses were compassionate and thus inclined to feel sorry for defendants." Mr. Smith notes these cases because nursing and "treatment" comes from the same milieu. These explanations offer examples of the State's awareness of the conflict between compassion for individuals shown by "treatment" providers and incarceration of the person the State has brought charges against. The State is aware that compassion and sympathy may stand in the way of incarceration. In SVP cases, with the help of the legislature, the State can tap into the compassion and sympathy to gain the respondent's "treatment" without the burden of focusing on "secure confinement." It is almost certainly easier for the State to convince all twelve jurors of the person's need for the treatment than to convince them to confine the

person in a secure facility because the State has proven beyond a reasonable doubt that the person is more likely than not to engage in predatory acts of sexual violence if not confined.

The instruction required by Section 632.492 shifts the focus from secure confinement to treatment because it is not a *complete* expression of the result of an SVP verdict required by Section 632.495. Under this latter section, "If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment *until such time as the person's mental abnormality has so changed that he is safe to be at large*." (emphasis added). This highlighted portion is consistent with the "continued segregation of sexually violent offenders" which is the "overriding concern" of the law. ***Hendricks***, 117 S.Ct. at 2084. And this information was provided to the jurors in Instruction No. I offered by Mr. Smith but refused by the court (L.F. 200). This reference to secure confinement is eliminated from the instruction the legislature requires to be given to the jurors: "If the trial is held before a jury, the judge shall instruct the jury that if it finds that the person is a sexually violent predator, the person shall be committed to the director of the department of mental health for control, care and treatment." Mr. Smith believes that leaving out the remainder of the statutory result of an

SVP verdict shapes the impression given to the jurors by the court in the instruction.

The United States Supreme Court held in ***Caldwell v. Mississippi*** that it is unconstitutionally impermissible to rest a death sentence on a determination of a jury that has been led to believe that the responsibility for determining the appropriateness of the sentence rests elsewhere. 427 U.S. 320, 328-329, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985). The Missouri Supreme Court has extended this prohibition against minimizing the sense of the jurors' responsibility to closing argument in non-capital cases. The State may not argue in a manner that minimizes the responsibility of the jury in the imposition of sentence. ***State v. Roberts***, 709 S.W.2d 857, 869 (Mo. banc 1986). The Court in ***Roberts*** admonished prosecutors to avoid such arguments. ***Id.*** And Judge Blackmar advised the courts of this State to "hold, unequivocally, that prosecutors act improperly in attempting to minimize the jury's responsibility in cases in which sentencing is a jury function." ***Id.*** at 872.

The situation in this appeal is somewhat different because the legislature requires that the instruction be given, and the State premised its argument on the instruction read to the jurors. ***Caldwell*** only prohibits misleading the jurors as to their role in sentencing, but does not prohibit correct statements of the law. ***State***

v. Richardson, 923 S.W.2d 301, 321 (Mo. banc 1996). But that does not justify the submission of Instruction No. 7 to the jurors or the State's argument that the jurors were deciding whether Mr. Smith needs treatment. The State correctly argued to the jurors in ***State v. Stutts***, 723 S.W.2d 594, 595-596 (Mo. App., W.D. 1987), that the trial court could lower any sentence imposed by the jury. The Western District noted that the argument was "technically correct," but the question remained whether a technically correct statement could nonetheless mislead the jury regarding its responsibility in the case. ***Id***. at 596. In deciding this question, the Western District saw no reason not to apply the ***Caldwell*** analysis to a non-capital case. ***Id***. at 597. The Court concluded that the "correct" argument informed the jurors that the trial court was not bound by their verdict and "altered the sense of responsibility for the sentence they were to assess by their verdict." ***Id***. The Western District reversed the conviction under the plain error rule. ***Id***.

One question perhaps remains: how can the probate court be convicted of error for doing something the legislature requires? The Missouri Supreme Court provided an answer in ***State v. Carson***, 941 S.W.2d 518 (Mo. banc 1997). There, the Court held that, "[i]f an instruction following MAI-CR3d conflicts with the substantive law, any court should decline to follow MAI-CR3d or its Notes on

Use." ***Id***. at 520. Instruction No. 7 was not required by the MAI, but it was required by an act of the legislature. And as discussed above, it fails to accurately follow the substantive law by failing to advise the jurors of the additional language in Section 632.495, that the commitment lasts "*until such time as the person's mental abnormality has so changed that he is safe to be at large*." Because the instruction required by Section 632.492 conflicts with the substantive law regarding the result of an SVP verdict in 632.495, the probate court may decline to follow it.

The issue raised in this appeal is similar to that presented to the Southern District Court of Appeals in ***In the Matter of the Care and Treatment of Scates***, 134 S.W.3d 738 (Mo. App., S.D. 2004). But erroneous conclusions by the Court and critical distinctions between these cases render ***Scates*** unpersuasive in this appeal. The Southern District noted that non-MAI instructions must follow the substantive law being presented to the jurors. ***Id***. at 742. The Court then concluded that parroting the statutory language followed the substantive law. ***Id***. Mr. Smith disagrees. The language in Instruction No. 6 parrots the language of Section 632.492, but it does not set out the substantive law regarding the statutory consequences of the jurors returning a verdict finding the person to be a sexually violent predator. "If the … jury determines that the person is a

sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment *until such time as the person's mental abnormality has so changed that he is safe to be at large*." Section 632.495 (emphasis added). Removing the emphasized language from the jurors fails to submit the substantive law.

The Southern District believed that the point was not well-raised in ***Scates*** because at trial the appellant stated that the required instruction was "okay as far as it goes," but argued that it did not go far enough. ***Id***. at 742. But Mr. Smith sought dismissal of the petition because of the requirement of Section 632.492 (L.F. 110-112), objected to submission of Instruction No. 6 (Tr. 407-409), and offered Instruction No. I only as an alternative version of an instruction the probate court was going to submit to the jurors (Tr. 409).

The instruction required by the legislature focused the jurors on the question of Mr. Smith's need for treatment, a matter wholly irrelevant to their appropriate duty to determine whether Mr. Smith is a sexually violent predator in the first place. Focusing the jurors on treatment which will follow their verdict minimized their sense of responsibility in the verdict. The probate court erred in submitting Instruction No. 6 to the jury. The judgment and commitment order of

the probate court must be reversed and the cause remanded for a new trial without an instruction on treatment.

IV.

The probate court erred in submitting the verdict form offered by the State and in entering a judgment committing Mr. Smith to secure confinement in the Department of Mental Health as a sexually violent predator, in violation of his rights to due process of law and to a trial by a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that the jury did not return a verdict finding the necessary elements required by Section 632.480(5), RSMo Cum. Supp. 2003; that Mr. Smith has been found guilty of a sexually violent offense, suffers a mental abnormality affecting his emotional or volitional capacity predisposing him to commit sexually violent offenses, and which makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

A sexually violent predator is "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who has pled guilty or been found guilty of a sexually violent offense." Section 632.480(5), RSMo

Cum. Supp. 2003. A mental abnormality is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Section 632.480(2). The Missouri Supreme Court requires instructing the jurors that a mental abnormality must make the person more likely than not to re-offend. ***Thomas v. State***, 74 S.W.3d 789 (Mo. banc 2002). These definitions mirror the requirements of the Kansas law upheld by the United States Supreme Court because they "require[] a finding of future dangerousness, and then link[] that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior." ***Kansas v. Hendricks***, 521 U.S. 346, 358, 117 S.Ct. 2072, 2080, 138 L.Ed.2d 501 (1997); ***Kansas v. Crane***, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). "The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Section 632.495, RSMo Cum. Supp. 2003. In compliance with these requirements, the probate court submitted Instruction No. 5 to the jurors informing them of the applicable law of the case:

If you find and believe from the evidence beyond a reasonable doubt:

First, that the respondent pleaded guilty to sexual abuse first degree in the Circuit Court of Jackson County, Missouri, on December 15, 1992, and

Second, that the offense for which the respondent was convicted was a sexually violent offense,[4] and

Third, that the respondent suffers from a mental abnormality[5], and

Fourth, that this mental abnormality makes the respondent more likely than not to engage in predatory acts of sexually violence if he is not confined in a secure facility,

then you will find that the respondent is a sexually violent predator.

(L.F.189).

But the jurors did not find that Mr. Smith is a sexually violent predator. They found that he "should" be committed to DMH for control, care and treatment. This is not the question presented to them by any of the statutory or case law applicable to sexually violent predator commitments set out above. The probate court submitted a verdict form prepared by the State over Mr. Smith's

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[4] The instruction also told the jurors that sexual abuse first degree is a sexually violent offense (L.F.189).

[5] The instruction included the definition of a mental abnormality (L.F.189).

objection and offer of an alternative, and appropriate, verdict form. Mr. Smith objected during the instruction conference to submitting the verdict form prepared by the State (Tr. 410-411). That verdict read:

> We, the jury, find that respondent Kenneth F. Smith _____ (here insert either "should" or "should not") be committed to the Department of Mental Health for control, care and treatment as a sexually violent predator.

(L.F. 201). Mr. Smith offered an alternative verdict form, reading:

> We, the jury, find that Kenneth Smith _____ (insert "is' or "is not") a sexually violent predator as submitted in Instruction No. ___.

(Tr. 410-411, Sup.L.F. 1). The trial court overruled Mr. Smith's objection, rejected his alternative verdict form, and submitted the State's verdict to the jurors (Tr. 410-411).

The State did not ask the jurors to find that Mr. Smith is a sexually violent predator according to the statutory elements. The assistant attorney general informed the jurors, "… I'm going to ask you for a verdict committing Mr. Smith to the Department of Mental Health as a sexually-violent predator for care, control and treatment." (Tr. 598). In the verdict form the State prepared it asked only for the jurors' affirmance of its belief that Mr. Smith should be subjected to

compulsory treatment. The jurors returned a verdict finding "that respondent Kenneth F. Smith should be committed to the Department of Mental Health for control, care and treatment as a sexually violent predator." (L.F. 201).

The probate court entered an order finding that Mr. Smith "has been found to be a sexually violent predator …." (L.F. 228). This, of course, is incorrect. The jurors did not find Mr. Smith to be a sexually violent predator because that question was not submitted to them. They found only that he "should" be committed to DMH for custody, care and control as a sexually violent predator, without first finding the elements necessary for them to reach such a verdict.

Had the probate court submitted to the jurors Mr. Smith's proposed verdict form, the parties, probate court, and this Court would have been assured that the jurors unanimously found beyond a reasonable doubt each element of law required for involuntary civil commitment. Mr. Smith's proposed verdict form was necessary before the probate court could appropriately enter the judgment it did, that Mr. Smith "has been found to be a sexually violent predator under Mo. Rev. Stat. §632.480 upon a unanimous jury verdict…." (L.F. 326-327). As it is, all we can be sure of is that the jurors unanimously agreed that Mr. Smith "should" be placed in DMH for sex offender treatment.

While this claim is not a sufficiency challenge, the principles applied in such cases are relevant here. Missouri courts use the same evidentiary standards for commitment of sexually violent predators as for criminal cases. ***In the Matter of the Care and Treatment of Amonette***, 98 S.W.3d 593, 600 (Mo. App., E.D. 2003). "At stake in," ***Apprendi v. New Jersey*** were, "constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6." 530 U.S. 466, 476-477, 120 S.Ct. 2348, 2355, 147 L.Ed.2d 435 (2000). "[C]ivil commitment of [sexually violent predators] impinges on the fundamental right of liberty." ***In the Matter of the Care and Treatment of Norton,*** 123 S.W.3d 170, 173 (Mo. banc 2003). "Taken together, these rights indisputably entitle a criminal defendant to a 'jury determination that [he] is guilty *of every element of the crime with which he is charged*, beyond a reasonable doubt.'" ***Apprendi***, 120 S.Ct. at 2355-2356. (emphasis added). So too, is Mr. Smith indisputably entitled to a jury determination beyond a reasonable doubt that he meets *every element* necessary to civilly commit him as a sexually violent predator. The probate court submitted a verdict form prepared by the State which fails to meet this constitutional standard. There is no definitive finding by

the jury that Mr. Smith meets each of the four necessary elements for commitment set out in Instruction No. 5.

The Missouri Supreme Court in ***Morse v. Johnson,*** 594 S.W.2d 610, 615 (Mo. banc 1980) was confronted with the contention that the verdict forms proposed by the trial judge were, *inter alia*, "confusing and misleading [and] failed to resolve the issues as to all parties." In its determination of the issue, the Court set forth the following general rules:

> (1) That the verdict must be clear and unambiguous so that a judgment may be written upon it without resorting to inference or to construction; (2) that if from a consideration of the whole record the meaning of the jury can be made clear and the judgment is based upon what the jury actually found, it will be upheld; (3) that verdicts should be construed to give them effect if it can reasonably be done; (4) that the jury's intent is to be arrived at by regarding the verdict liberally and (5) although defective in form, if a verdict substantially finds the question in issue in such a way as will enable the court intelligently to pronounce judgment thereon for one or the other party, it is sufficiently certain.

Id. It may be argued that the verdict form in this case meets these standards because the jurors stated in their verdict: "We, the jury, find that respondent

James E. Smith should be committed to the Department of Mental Health for control, care and treatment *as a sexually violent predator*." (L.F. 325) (emphasis added). Mr. Smith disagrees that this verdict comports with the required standards. The probate court's judgment that Mr. Smith "has been found to be a sexually violent predator under Mo. Rev. Stat. §632.480," can only be written by inferring or construing that the emphasized language of the verdict means a unanimous jury verdict on each of the four necessary elements set out in Instruction No. 5. With Mr. Smith's proposed instruction no such inference or construction would have been necessary. Nor does Mr. Smith believe that the verdict substantially finds the question in issue, whether he is a sexually violent predator as set out in the four paragraphs of Instruction No. 5, in such a way that enabled the probate court to pronounce judgment without inferring or construing what the emphasized language of the verdict form meant. The Missouri Supreme Court held in ***State v. Whitfield***, 107 S.W.3d 253, 263 (Mo. banc 2003), that a "presumption" that the jurors found the necessary elements contained in a verdict director is inadequate to overcome the high, constitutional necessity of proof beyond a reasonable doubt.

Applying the ***Morse*** standard of considering the "whole record" to determine the meaning of the jurors opens another whole can of worms. It may

be argued that the jurors "found" Mr. Smith to be a sexually violent predator in the verdict form because Instruction No. 5 told the jurors that if they found the four elements set out therein, "then you will find that the respondent is a sexually violent predator," and Instruction No. 6 advised the jurors, "If you find Respondent to be a sexually violent predator, Respondent shall be committed to the custody of the director of the department of mental health for control, care and treatment," and therefore when they found that Mr. Smith "should be committed to the Department of Mental Health for control, care and treatment as a sexually violent predator," they necessarily found the four elements set out in Instruction No. 5. This is the sort of convoluted reasoning that the verdict form should seek to avoid. The verdict form fails to meet the first ***Morse*** standard of being sufficiently clear and unambiguous so that a judgment may be written without resorting to inference or construction. And most importantly, this extrapolation of what the jurors meant by inferring or construing that meaning from three separate forms would have been unnecessary if the probate court had submitted Mr. Smith's offered verdict form asking the jurors to find whether he "is or is not a sexually violent predator as submitted in Instruction No. ___." (Sup.L.F. 1).

Sixteen defendants were indicted for rioting in ***Wynn v. State***, 1 Blackf. 1147 (Ind. 1818). The jury returned a verdict: "We the jury fine" eight named defendants "at ten dollars each," and four other defendants, "at one dollar each," and were silent regarding the other two defendants. ***Id***. The Indiana Supreme Court reversed and ordered a new trial because:

> The verdict is insufficient to authorize a judgment. It does not find the defendants guilty. The fining of the defendants as the jury have expressed themselves, or the finding of the amount of the fine as authorized by the act of Assembly, is not finding the defendants guilty. And it must be found expressly, not by intendment, that the defendants are guilty. It is a correct position that the finding of but part of the issue is insufficient. But here is more that an omission of part of the issue; there is a total neglect of the whole subject matter put in issue, and no judgment ought to have been given upon it.

Id. So, too, in Mr. Smith's case was a total neglect of the whole subject matter put in issue, whether he is a sexually violent predator under the elements of the statute. And, too, that the jurors thought he should be confined for treatment as is done with sexually violent predators is no different than the Indiana jurors

awarding a judgment authorized by the legislature. It is likewise insufficient to support a judgment by the court.

There is no Missouri Approved Instruction or approved Form of Verdict for use in sexually violent predator cases. The closest to an "approval" may be the verdict directing instruction given in ***Thomas***, ***supra***. The Missouri Supreme Court did not judge the propriety of the instruction except for the lack of the necessary definition of a mental abnormality. 74 S.W.3d at 791-792. The Court set out a portion of the verdict directing instruction in its opinion:

> If you find from the evidence beyond a reasonable doubt:
>
> ******
>
> Third, that the respondent suffers from a mental abnormality, and
>
> Fourth, that as a result of this abnormality the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, then you will find respondent is a sexually violent predator.

Id. at 790. This instruction mirrors the introduction, the third and fourth paragraphs, and conclusion of Instruction No. 5 given in Mr. Smith's trial. Mr. Smith believes that it is fair to assume that the first and second paragraphs of the instruction in ***Thomas*** set out the offense and the sexually violent nature of the

offense which the jurors had to likewise find in paragraphs first and second of Instruction No. 5 in Mr. Smith's trial. It would seem that Instruction No. 5 set out the necessary elements the jurors have to find in order to commit a person to indefinite, secure confinement in DMH as a sexually violent predator.

Because this case involves involuntary civil commitment to DMH, Mr. Smith reviewed the Missouri Approved Instructions for a verdict directing instruction and form of verdict approved for use in general civil commitment cases. The approved Form of Verdict – Commitment for Mental Illness is similar to the verdict form given in Mr. Smith's case. The approved verdict form reads:

> We, the undersigned jurors, find:
>
> That respondent _____ (here insert either "should" or "should not") be detained for treatment.

MAI 36.18. This does not, however, authorize the submission of the verdict form submitted to the jurors in Mr. Smith's case because the question the jurors are asked to resolve is markedly different in an SVP case than in a general civil commitment. The approved verdict directing instruction in a general civil commitment case reads:

> Your verdict must be that respondent *should be detained for treatment* if you believe:

First, that respondent is mentally ill, and

Second, as a result of such mental illness, respondent presents a substantial risk of serious physical harm to [himself] [others].

MAI 31.14 (emphasis added). Obviously, the question the jurors are being called upon to determine in a general civil commitment case is whether the person should be detained for treatment.

The jurors in an SVP case do not determine if the person "should be detained for treatment." They are to determine "whether, beyond a reasonable doubt, the person is a sexually violent predator." Section 632.495, RSMo 2000. It is wrong for the State and error for the probate court to *not* ask the jurors to decide that specific question in the verdict form.

Instead, the State requested and the probate court asked the jurors if they thought Mr. Smith should be committed for treatment. Not only does this violate the charge given to them by Section 632.495, it is also contrary to the holdings of other courts that have considered this issue. The California court of appeals held in ***People v. Rains***, 75 Cal.App.4th 1165, 1171 (Cal. App., 1999), the fact that the person would receive treatment in a psychiatric facility has "no relevance" to the legitimate questions before the jurors; whether the person has a diagnosed mental disorder and whether that disorder makes the person

dangerous to others because he is likely to engage in sexually violent behavior. The Kansas court of appeals held in ***In the Matter of the Care and Treatment of Lair***, 11 P.3d 517, 519 (Kan. App., 2000), that, "[t]he statute provides that a jury is only to determine whether the individual is a sexually violent predator. The jury is not concerned with and does not determine the course of treatment for a sexually violent predator."

It is abundantly clear that the question for Mr. Smith's jury was only whether he is or is not a sexually violent predator. Unlike a general civil commitment, whether Mr. Smith "should" be committed to DMH for control, care and treatment is not a question for them to resolve. Yet that is the question they were asked, over Mr. Smith's objection, by the probate court to answer. The jurors did not specifically answer the correct question, whether or not Mr. Smith *is* a sexually violent predator. The probate court erred in entering a judgment against Mr. Smith in the absence of a specific finding on the only, and necessary, question for the jurors to resolve. Mr. Smith must be discharged from custody.

CONCLUSION

Completion of or failure to complete sexual offender treatment is irrelevant to the question of whether Mr. Smith has a mental abnormality predisposing him to commit predatory acts of sexual violence, which causes him serious difficulty controlling his behavior, and makes him more likely than not to engage in such acts in the future if not confined in a secure facility. And yet the State based its involuntary civil commitment of Mr. Smith on the assertion that only treatment can prevent re-offense, that Mr. Smith has been offered treatment but failed to take advantage of it, and he must therefore be securely confined and forced to complete treatment before he is allowed to be at large. A person is not a sexually violent predator just because he is an untreated sex offender, a person is not civilly committed because he has not had treatment, and committed persons are not released simply because they have completed treatment. The jurors were misled into depriving Mr. Smith of his constitutional right of liberty for improper and insufficient reasons. And requiring the probate court to advise the jurors that if they found Mr. Smith to be a sexually violent predator he would be committed to the Department of Mental Health for treatment violated his right to due process of law. Mr. Smith must be discharged or his commitment reversed and the cause remanded for a new trial at which the State can be

compelled to establish the appropriate, and lawful, basis for civil commitment before depriving Mr. Smith of his liberty.

Respectfully submitted,

_____

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 18,433 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in July, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of August, 2004, to James R. Layton, State Solicitor, Office of Attorney General, 207 W. High, Supreme Court Building Jefferson City, Missouri 65101.

_____

Emmett D. Queener

APPENDIX

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